DEVELOPMENT & COMMERCIAL BANK BHD A

v.

LIEW WENG HANG & ORS

COURT OF APPEAL, PUTRAJAYA B
GOPAL SRI RAM JCA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
[CIVIL APPEAL NO: W-04-81-2001]
14 SEPTEMBER 2007 C

TORT: *Conversion - Banker and customer - Damages - Recovery of value of cheques - Test of direct consequence*

TORT: *Negligence - Banker and customer - Damages - Recovery of value of cheques - Duty of care* D

The appellant/defendant in this appeal was a bank and the respondents/plaintiffs were its customers. At the material time there was in the plaintiffs' employ a man by the name of Kang, also a customer of the defendant, who owed the plaintiffs the considerable sum of RM211,489.29. He gave the plaintiffs five cheques in settlement of the debt that were all drawn on the defendant's branch at Kepong, Kuala Lumpur, the same branch at which the plaintiffs had their account. When the plaintiffs presented the first cheque, there was insufficient money in Kang's account to meet his cheque. Instead of returning the cheque to the plaintiffs indicating that it had been dishonoured, the manager of the defendant's Kepong branch returned the cheque to Kang. The plaintiffs, who were not told that the cheque had been dishonoured because of lack of funds, assumed that the first cheque was good for payment. They then presented each of the other cheques and on each occasion the same thing happened *ie*, the defendant handed each cheque to Kang. After the last cheque was dealt with in this way, Kang left the plaintiffs' employment and disappeared. The plaintiffs, after discovering the truth, brought an action based on both conversion and negligence against the defendant to recover the value of the five cheques. The sessions court found for them. The defendant's appeal to the High Court – which was confined to quantum – failed, resulting in the present appeal. The defendant argued that since Kang had no money in his account, the cheques he gave the plaintiffs were worth E F G H I

A nothing. The plaintiffs should therefore receive only nominal damages and awarding them the full value of the worthless cheques would amount to punishing the defendant.

Held (dismissing the appeal)

B **Per Gopal Sri Ram JCA delivering the judgment of the court:**

(1) The tort of conversion is a tort of strict liability and, as such, the rule as to remoteness of damage governing it is that of direct consequences. In short, a tortfeasor who commits C conversion is liable for all the harm that is the direct consequence of his act. In this instance, when the defendant returned the cheques to Kang, it committed the tort of conversion because it was the plaintiffs who were entitled in law to possession of the cheques. As a result, the plaintiffs D were entitled to the full value appearing on the face of the cheques. The fact that there were insufficient funds in Kang's account to meet his cheques was a fact irrelevant to the commission of the tort. Having denied the plaintiffs' title to the cheques in question, the defendant was liable for all the E damage that befell the plaintiffs which was in direct consequence of the defendant's act. That damage was the value of the cheques, being the amount appearing on the face of each of them. (paras 3, 4, 5 & 6)

F **(2)** The defendant had a contract with the plaintiffs. Hence, its failure to return the cheques to the plaintiffs and to inform them that none of the cheques was good for payment constituted in law a statement or representation of fact that the cheques were good for payment and that the sums they G represented had been credited to the plaintiffs' account. On the facts, that was a misstatement. It was carelessly made and, hence, constituted a breach of duty. The defendant's omission was something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human H affairs, would do, or doing something which a prudent and reasonable man would not do (*Blyth v. Birmingham Waterworks Co* (foll)). Accordingly, the defendant was liable to compensate the plaintiffs for all losses that were reasonably foreseeable as a consequence of the breach. From the point of view of the I tort of negligence, this was a simple and most obvious case of a statement carelessly made by conduct. It fell squarely within

the principles laid down in *Hedley Byrne & Co v. Heller and Partners*. The courts below were obviously correct in entering judgment for the plaintiffs. (paras 8 & 9)

Bahasa Malaysia *Translation Of Headnotes*

Perayu/defendan dalam rayuan ini adalah sebuah bank sementara responden/plaintiff adalah pelanggan-pelanggannya. Pada waktu material terdapat seorang pekerja plaintif yang bernama Kang, juga pelanggan defendan, yang berhutang dengan plaintif sebanyak RM211,489.29. Kang telah menyerahkan lima keping cek kepada plaintif bagi membayar hutangnya. Kesemua cek-cek adalah untuk ditunaikan di cawangan defendan di Kepong, Kuala Lumpur, iaitu cawangan di mana plaintif juga mempunyai akaun. Apabila plaintif menyerahkan cek pertama, akaun Kang didapati tidak mempunyai wang mencukupi bagi penunaian cek tersebut. Walaupun begitu, pengurus cawangan defendan di Kepong tidak mengembalikan cek kepada plaintif sebagai tanda ia telah ditendang, tetapi sebaliknya memulangkan cek tersebut kepada Kang. Plaintif, yang tidak diberitahu bahawa cek telah ditendang kerana ketidakcukupan wang, menganggap cek pertama sebagai teratur untuk pembayaran. Berikutnya, plaintif mengemukakan cek-cek yang lain untuk pembayaran, dan perkara yang sama berlaku setiap kali cek-cek tersebut dimasukkan, iaitu defendan mengembalikan cek kepada Kang. Setelah cek terakhir dikembalikan kepada Kang, Kang meninggalkan perkhidmatan plaintif dan menghilangkan diri. Setelah mengetahui kedudukan perkara yang sebenar, plaintif memulakan tindakan penukaran (conversion) dan cuai terhadap defendan bagi mendapatkan nilai kelima-lima cek. Mahkamah sesyen membenarkan tuntutan plaintif. Rayuan defendan ke Mahkamah Tinggi – yang terhad kepada kuantum – gagal, sekaligus membawa kepada rayuan di sini. Defendan berhujah bahawa oleh kerana Kang tidak mempunyai wang dalam akaunnya, maka cek-cek yang diberikan Kang kepada plaintif tidak mempunyai apa-apa nilai. Oleh yang demikian, plaintif hanya berhak kepada satu gantirugi nominal. Dihujahkan selanjutnya bahawa mengawardkan nilai penuh cek-cek tersebut samalah seperti menghukum defendan.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Tort penukaran adalah tort liabiliti ketat dan oleh kerana itu kaedah kerosakan luar duga yang mengawalya adalah kaedah akibat terus. Ertinya, seorang pelaku tort yang melakukan

penukaran adalah bertanggungan atas segala kerosakan yang merupakan akibat terus perbuatannya. Dalam kes semasa, apabila defendan mengembalikan cek kepada Kang, ia melakukan tort penukaran kerana yang berhak kepada pemegangan cek di sisi undang-undang adalah plaintif. Akibatnya, plaintif berhak kepada nilai penuh yang tercatit di permukaan cek. Fakta bahawa akaun Kang tidak mengandungi cukup wang bagi memenuhi nilai ceknya adalah tidak relevan kepada perlakuan tort. Setelah menidakkan hak plaintif kepada cek berkenaan, defendan bertanggungan kepada segala kerugian yang menimpa plaintif secara terus akibat dari perbuatan defendan. Kerugian adalah pada nilai cek-cek tersebut, iaitu jumlah yang tertera di permukaan setiap satu cek itu.

(2) Defendan mempunyai kontrak dengan plaintif. Oleh itu, kegagalan untuk mengembalikan cek kepada plaintif dan untuk memberitahu mereka bahawa tiada satupun dari cek-cek boleh dibayar adalah satu nyataan atau representasi fakta di sisi undang-undang bahawa cek-cek tersebut adalah boleh dibayar dan bahawa jumlah yang direpresentasi telah dikreditkan ke akaun plaintif. Di atas fakta, itu adalah suatu nyataan salah. Ia dilakukan secara cuai dan kerana itu adalah satu kemungkiran tanggungjawab. Mengambilkira pertimbangan-pertimbangan biasa yang mengawal-selia tatalaku manusia, seorang yang munasabah akan melakukan apa yang tidak dilakukan oleh defendan, atau sebaliknya, tidak akan melakukan apa yang dilakukan oleh defendan di sini (*Blyth v. Birmingham Waterworks Co* (diikuti)). Oleh itu, defendan bertanggungan untuk mempampas plaintif atas segala kerugian yang secara munasabah boleh dijangkakan akan berlaku akibat dari kemungkirannya. Dari sudut pandangan tort cuai, ini adalah satu kes jelas di mana satu kenyataan telah dibuat secara cuai melalui kelakuan. Ia terangkum ke dalam prinsip-prinsip yang diungkapkan di dalam *Hedley Byrne & Co v. Heller and Partners*. Mahkamah-mahkamah di bawah jelas betul dalam memberi penghakiman kepada plaintif.

Case(s) referred to:
Blyth v. Birmingham Waterworks Co [1856] 11 Exch 781 ***(foll)***
Hedley Byrne & Co v. Heller and Partners [1963] 2 All ER 575 ***(foll)***
Hollins v. Fowler [1875] LR 7 HL 757 ***(refd)***
Weld-Blundell v. Stephens [1920] AC 956 ***(foll)***
Mooney & Ors v. Peat, Marwick, Michell & Co & Anor [1966] 1 LNS 109 ***(foll)***

For the appellant - Siew Yew Ming (Harmeet Singh with him); M/s Raja Eleena Siew Ang & Assoc
For the respondents - Ahmad Moosdeen (Siti Shamsiah Ismail with him); M/s Chan, Moosdeen & Partners

[Appeal from High Court, Kuala Lumpur; Civil Appeal No: R2-12-325-1998]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] The defendant (appellant before us) is a banker. The plaintiffs (respondents before us) are its customers. At the material time there was in the plaintiffs' employ a man by the name of Kang. He too was a customer of the defendant. He owed the plaintiffs a considerable sum of money: RM211,489.29 in all. He gave the plaintiffs 5 cheques in settlement of the debt. They were all drawn on the defendant's branch at Kepong, Kuala Lumpur. That is the same branch at which the plaintiffs had their account. The plaintiffs presented the first cheque. There was insufficient money in Kang's account to meet his cheque. In the ordinary course of business, a bank will return such a cheque to the presenter – be it a bank or its own customer – indicating that it had been dishonoured. But that is not what happened here. The manager of the defendant's Kepong branch returned the cheque to Kang. The plaintiffs were not told that the cheque had been dishonoured because of lack of funds. So, they assumed that the first cheque was good for payment. They then presented each of the other cheques and on each occasion the same thing happened. Each cheque was handed to Kang by the defendant bank. After the last cheque was dealt with in this way Kang left the plaintiffs' employment and disappeared. Later, the plaintiffs discovered the truth. They brought an action against the defendant to recover the value of the 5 cheques. They based their cause of action both in conversion and negligence. The Sessions Court found for them. The defendant bank appealed to the High Court. At the hearing it did not go forward on their appeal on liability. It confined its case to quantum. It failed. It then appealed to us. We too dismissed the appeal.

[2] The defendant's complaint in this appeal may be – without doing any disservice to learned counsel who argued its case – summarised thus. Kang had no money in his account. The cheques he gave the plaintiffs were therefore worth nothing. The plaintiffs should therefore receive only nominal damages. Awarding the plaintiffs the full value of the worthless cheques would amount to punishing the defendant. This line of argument is without merit for several reasons.

[3] In the first place it is important to bear in mind the nature of the causes of action that the plaintiffs relied upon. One of them is the tort of conversion. It is a tort of strict liability. Lord Chelmsford defined it as follows in *Hollins v. Fowler* [1875] LR 7 HL 757:

> any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion.

[4] It follows that mistake of law and, generally speaking, mistake of fact will not afford a defence to the tort. In *Hollins v. Fowler*, Blackburn J when delivering his judgment in the Court of Exchequer said:

> However hard it may be on those who deal innocently and in the ordinary course of business with a person in possession of goods, yet, as long as the law as laid down in *Hardman v. Booth*, 1 H. & C.803, is unimpeached, I think it is clear law, that if there has been what amounts in law to a conversion of the plaintiff's goods, by any one, however innocent, that person must pay the value of the goods to the real owners, the plaintiffs.

[5] Because conversion is a tort of strict liability, the rule as to remoteness of damage governing it is that of direct consequences. In short, a tortfeasor who commits conversion is liable for all the harm that is the direct consequence of his act. Lord Sumner in *Weld-Blundell v. Stephens* [1920] AC 956 described the direct consequence test follows:

> Direct cause excludes what is indirect, conveys the essential distinction, which *causa causans* and *causa sine qua non* rather cumbrously indicate, and is consistent with the possibility of the concurrence of more direct causes than one, operating at the same time and leading to a common result as in *Burrows v. March Gas and Coke Co* [1872] LR 7 Exch 96 and *Hill v. New River Co* [1868] 9 B & S 303; 18 LT 355.

[6] Now apply that here. When the defendant returned the cheques to Kang it committed the tort of conversion because it was the plaintiffs who were entitled in law to possession of the cheques. As a result, the plaintiffs were entitled to the full value appearing on the face of the cheques. The fact that there were insufficient funds in Kang's account to meet his cheques is a fact irrelevant to the commission of the tort. Having denied the plaintiffs' title to the cheques in question, the defendant bank is liable for all the damage that befell the plaintiffs which was in direct consequence of the defendant's act. That damage is the value of the cheques being the amount appearing on the face of each of them.

[7] I now turn to the second cause of action, namely negligence. You begin with the premise that at the material time there was an underlying contractual relationship between the plaintiffs and the defendant. For, as banker, the defendant had a contract with the plaintiffs as its customers in relation to the account they operated with its branch. This is a special relationship giving rise to a duty of care in the plaintiffs' favour. As Raja Azlan Shah J (as His Royal Highness then was) said in *Mooney & Ors v. Peat, Marwick, Michell & Co & Anor* [1966] 1 LNS 109:

> *Hedley*'s case (*Hedley Byrne & Co v. Heller and Partners* [1963] 2 All ER 575) is concerned with the proposition that wherever there is a relationship equivalent to contract there is a duty of care, and the relationship may be either of a general character, for example, the relationship of solicitor and client or of banker and customer, or of a particular character created *ad hoc*.

[8] The defendant bank had a contract with the plaintiffs. Hence, its failure to return the cheques to the plaintiffs and to inform them that none of them was good for payment constitutes in law a statement or representation of fact that the cheques were good for payment and that the sums they represented had been credited to the plaintiffs' account. On the facts that was a misstatement. It was carelessly made and hence constituted a breach of duty. To paraphrase in less elegant language the much worn words of Baron Alderson in *Blyth v. Birmingham Waterworks Co* [1856] 11 Exch 781, at p 784, the defendant's omission is something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human

affairs, would do, or doing something which a prudent and reasonable man would not do. Accordingly, the defendant was liable to compensate the plaintiffs for all loss that was reasonably foreseeable as a consequence of the breach.

[9] From the point of view of the tort of negligence, this is a simple and most obvious case of a statement carelessly made by conduct. It falls squarely within the principles laid down in *Hedley Byrne*. The courts below were obviously correct in entering judgment for the plaintiffs. The appeal was therefore dismissed and those orders made that are usually consequent upon a dismissal.

[10] My learned brothers Suriyadi bin Halim Omar and Hasan bin Lah, JJCA have seen this judgment in draft and have expressed their agreement with it.